

# State Office of Administrative Hearings



Cathleen Parsley  
Chief Administrative Law Judge

September 9, 2010

Les Trobman, General Counsel  
Texas Commission on Environmental Quality  
P.O. Box 13087  
Austin Texas 78711-3087

Re: SOAH Docket No. 582-10-1638; TCEQ Docket No. 2009-0942-PST-E; In Re:  
Executive Director of the Texas Commission on Environmental Quality v.  
Federico C. Villarreal dba A-1 Paint & Body Shop

Dear Mr. Trobman:

The above-referenced matter will be considered by the Texas Commission on Environmental Quality on a date and time to be determined by the Chief Clerk's Office in Room 201S of Building E, 12118 N. Interstate 35, Austin, Texas.

Enclosed are copies of the Proposal for Decision and Order that have been recommended to the Commission for approval. Any party may file exceptions or briefs by filing the documents with the Chief Clerk of the Texas Commission on Environmental Quality no later than September 29, 2010. Any replies to exceptions or briefs must be filed in the same manner no later than October 11, 2010.

This matter has been designated **TCEQ Docket No. 2009-0942-PST-E; SOAH Docket No. 582-10-1638**. All documents to be filed must clearly reference these assigned docket numbers. All exceptions, briefs and replies along with certification of service to the above parties shall be filed with the Chief Clerk of the TCEQ electronically at <http://www10.tceq.state.tx.us/epic/efilings/> or by filing an original and seven copies with the Chief Clerk of the TCEQ. Failure to provide copies may be grounds for withholding consideration of the pleadings.

Sincerely,

A handwritten signature in black ink, appearing to read "Travis Vickery", with a stylized flourish at the end.

Travis Vickery  
Administrative Law Judge

TV/l  
Enclosures  
cc: Mailing List

**STATE OFFICE OF ADMINISTRATIVE HEARINGS**

**AUSTIN OFFICE**

**300 West 15th Street Suite 502**

**Austin, Texas 78701**

**Phone: (512) 475-4993**

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**SERVICE LIST**

**AGENCY:** Environmental Quality, Texas Commission on (TCEQ)  
**STYLE/CASE:** FEDERICO C. VILLARREAL / A-1 PAINT & BODY SHOP  
**SOAH DOCKET NUMBER:** 582-10-1638  
**REFERRING AGENCY CASE:** 2009-0942-PST-E

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**STATE OFFICE OF ADMINISTRATIVE  
HEARINGS**

**ADMINISTRATIVE LAW JUDGE  
ALJ TRAVIS VICKERY**

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**REPRESENTATIVE / ADDRESS**

**PARTIES**

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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

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FREDERICO C. VILLARREAL

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**SOAH DOCKET NO. 582-10-1638**  
**DOCKET NO. 2009-0942-PST-E**

**EXECUTIVE DIRECTOR OF THE  
TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY**

**v.**

**FEDERICO C. VILLAREAL dba  
A-1 PAINT & BODY SHOP,  
Respondent**

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**BEFORE THE STATE OFFICE**

**OF**

**ADMINISTRATIVE HEARINGS**

**PROPOSAL FOR DECISION ON SUMMARY DISPOSITION**

**I. INTRODUCTION**

The Executive Director (ED) of the Texas Commission on Environmental Quality (TCEQ or Commission) seeks to assess \$7,875.00 in administrative penalties against Federico C. Villareal d/b/a A-1 Paint & Body Shop a/k/a A-1 Paint & Body Works (Respondent) and to require corrective action for violations of the Commission's rules regarding underground storage tanks (USTs).

The Administrative Law Judge (ALJ) recommends that the Commission find that the violations occurred, assess an administrative penalty of \$7,875.00, and order the corrective actions recommended by the ED.

**II. PROCEDURAL HISTORY AND JURISDICTION**

On October 9, 2009, the ED filed the Executive Director's Preliminary Report and Petition (EDPRP). The ED alleged violations against Respondent for failure to permanently remove from service, no later than 60 days after the prescribed upgrade implementation date, a UST system for which the applicable components of the system had not been brought into timely compliance with upgrade requirements.<sup>1</sup>

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<sup>1</sup> ED Ex. A and B.

Respondent filed an Answer to the EDPRP on October 28, 2009 and the matter was referred to the State Office of Administrative Hearings (SOAH) on December 7, 2009, for the assignment of an ALJ to conduct a hearing and issue a proposal for decision (PFD). On December 9, 2009, the Commission issued a notice of preliminary hearing, set for January 14, 2010 at SOAH.

A SOAH ALJ conducted a preliminary hearing on January 14, 2010. The hearing was attended by Phillip Goodwin and Marshall Coover, Staff Attorneys for the ED, and the Respondent, who represented himself. At the preliminary hearing, ED Exhibits A, B, C and D were admitted for jurisdictional purposes. Jurisdiction is undisputed and is therefore dealt with in the Findings of Fact and Conclusions of Law below. Consistent with the preliminary hearing, Order No. 1, issued on January 20, 2010, set a hearing on the merits for May 6, 2010.

The Executive Director's First Amended Report and Petition (EDFARP) was filed and sent to the Respondent on April 27, 2010.

At the request of Respondent, on May 5, 2010, the ED and Respondent filed a Joint Motion for Continuance and Stipulations to allow the ED sufficient time to perform an analysis of Respondent's ability to pay the administrative penalty. On May 6, 2010, the ALJ granted the motion for continuance and reset the hearing for August 6, 2010.

On July 16, 2010, the ED filed a Motion for Leave to File a Motion for Summary Disposition (Motion for Leave) and a Motion for Summary Disposition (MSD). Respondent did not respond to the Motion for Leave. On July 26, 2010, the ALJ granted the Motion for Leave and cancelled the hearing on the merits. Respondent did not file a response to the MSD.

### **III. LEGAL GROUNDS FOR SUMMARY DISPOSITION**

A motion for summary disposition may be granted if the moving party shows that it is entitled to relief as a matter of law. The Commission's rule on summary disposition is found at 30 TEX. ADMIN. CODE (TAC) § 80.137. The rule provides, in pertinent part, that:

Summary disposition shall be rendered if the pleadings, admissions, affidavits, stipulations, deposition transcripts, interrogatory answers, other discovery responses, exhibits and authenticated or certified public records if any, on file in the case at the time of hearing, or filed thereafter and before disposition with the permission of the judge, show that there is no genuine issue as to any material fact and the moving party is entitled to summary disposition as a matter of law on all or some of the issues expressly set out in the motion or in an answer or any other response.

#### **IV. ANALYSIS**

##### **A. Undisputed Facts**

The May 6, 2010 Joint Motion for Continuance was based on stipulations entered into by the parties as part of a compromise to potentially avoid a hearing on the merits and allow the ED time to review records regarding Respondent's financial ability to pay the administrative penalty (Stipulations). The Stipulations were executed by a staff attorney for the ED and Respondent's counsel, Charles Kvinta. The Stipulations were filed concurrently with the Joint Motion for Continuance.

The ED attached six exhibits to the MSD, including the Stipulations. Because Respondent failed to respond to the MSD, the exhibits are admitted.<sup>2</sup> Findings based on the Stipulations and other exhibits are set forth in the Findings of Fact and Conclusions of Law in the Proposed Order, without further recitation here.

##### **B. Respondent Violated 30 TAC § 334.47(a)(2)**

Commission rules require facilities with UST systems in existence as of December 22, 1998, to either upgrade those systems or permanently remove them from service within 60 days after the prescribed implementation date of December 22, 1998. Respondent owns the USTs at the Facility, which are not in compliance with 30 TAC § 334.47(a)(1).<sup>3</sup> As a

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<sup>2</sup> Not to be confused with the exhibits offered at the preliminary hearing for purposes of jurisdiction, the ED labeled the Summary Disposition Exhibits A, B, C, D, E and F.

<sup>3</sup> ED Ex. B at Stipulation Nos. 1, 2, 3, 5 and 6.

result, Respondent has violated 30 TAC § 334.47(a)(2). There is no genuine issue of material fact regarding the Respondent's violation, and the ED is entitled to judgment as a matter of law.

**C. The Penalty of \$7,875.00 is Reasonable and Justified**

Texas Water Code (Water Code) § 7.053 requires the ED to consider certain factors when calculating an administrative penalty. In considering those factors and using the Commission's Penalty Policy, the ED recommended a penalty of \$7,875.00 for the Respondent's violation.<sup>4</sup> Stipulation No. 7 established the penalty amount, subject to the ED's review of Respondent's ability to pay administrative penalties. Respondent, however, failed to respond to the ED's requests to provide financial documentation necessary to perform a review of his ability to pay.<sup>5</sup> According to Stipulation Nos. 4 and 8, Respondent agrees that the penalty sought is justified for the violation alleged in the EDFARP and that it was calculated in accordance with Water Code § 7.053 and the current TCEQ 2002 Penalty Policy. Based on the Stipulations there is no genuine issue of material fact regarding the calculation and assessment of the penalty. The ED is entitled to judgment as a matter of law that the penalty amount of \$7,875.00 is reasonable and justified.<sup>6</sup>

**D. The Corrective Actions Set Out in the Ordering Provisions are Necessary, Justified, and Appropriate**

The Commission is authorized to order a person who violates a statute or rule within the Commission's jurisdiction to take corrective action.<sup>7</sup> Commission rules require owners of UST systems that have not been upgraded to meet current requirements, to permanently remove the UST system from service.<sup>8</sup> In Stipulation No. 9, Respondent agreed that the Corrective Action Ordering Provisions recommended in the EDFARP are appropriate to correct the violation as alleged in the EDFARP. There is no genuine issue of material fact regarding the corrective

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<sup>4</sup> ED Ex. A and F.

<sup>5</sup> ED Ex. B and E.

<sup>6</sup> ED Ex. A, B and F.

<sup>7</sup> Water Code § 7.073.

<sup>8</sup> 30 TAC § 334.47(a)(2).

action ordering provisions; and the ED is entitled to judgment as a matter of law that they are necessary, justified, and appropriate. The corrective actions are set forth in the Corrective Action Ordering Provisions in the Proposed Order.<sup>9</sup>

## V. CONCLUSION

The ALJ recommends that the Commission find that the violations occurred; assess an administrative penalty of \$7,875.00; and order the corrective actions recommended by the ED.

**SIGNED September 9, 2010.**

  
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**TRAVIS VICKERY**  
**ADMINISTRATIVE LAW JUDGE**  
**STATE OFFICE OF ADMINISTRATIVE HEARINGS**

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<sup>9</sup> ED Ex. A and B.

# TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



## **AN ORDER    ASSESSING ADMINISTRATIVE PENALTIES AGAINST AND ORDERING CORRECTIVE ACTION BY FEDERICO C. VILLAREAL D/B/A A-1 PAINT & BODY SHOP; TCEQ DOCKET NO. 2009-0942-PST-E; SOAH DOCKET NO. 582-10-1638**

On \_\_\_\_\_, 2010, the Texas Commission on Environmental Quality (TCEQ or Commission) considered the Executive Director's First Amended Report and Petition (EDFARP) recommending that the Commission enter an order assessing administrative penalties against and requiring corrective action by Federico C. Villareal d/b/a A-1 Paint & Body Shop a/k/a A-1 Paint & Body Works (Respondent). A Proposal for Decision (PFD) on Motion for Summary Disposition was presented by Travis Vickery, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH).

After considering the ALJ's PFD, the Commission adopts the following Findings of Fact and Conclusions of Law:

### **I.        FINDINGS OF FACT**

1. Respondent owns real property with two inactive underground storage tanks (USTs) located at 521 West Main Street, Yorktown, DeWitt County, Texas (the Facility).
2. Respondent's USTs are not exempt or excluded from regulation and contain a regulated petroleum substance as defined in the rules of the Commission.
3. On March 31, 2009, a TCEQ Corpus Christi Regional Office investigator conducted a



- compliance investigation at the Facility. The investigator documented that Respondent had failed to permanently remove from service, no later than 60 days after the prescribed upgrade implementation date, a UST system for which any applicable component of the system had not been brought into timely compliance with the upgrade requirements.
4. Respondent was notified of the violation on March 31, 2009, when he signed the TCEQ Exit Interview Form.
  5. On May 29, 2009, a Notice of Enforcement was mailed to the Respondent, which he received on June 3, 2009.
  6. On October 9, 2009, the Executive Director filed his Preliminary Report and Petition (EDPRP) in accordance with TEX. WATER CODE ANN. § 7.054. The EDPRP alleged that Respondent violated 30 TEX. ADMIN. CODE § 334.47(a)(2) by failing to permanently remove from service, no later than 60 days after the prescribed upgrade implementation date, a UST for which any applicable component of the system had not been brought into timely compliance with the upgrade requirements.
  7. On October 28, 2009, Respondent filed Respondent's Answer to the EDPRP and requested a hearing.
  8. On December 7, 2009, this case was referred to SOAH for a contested case hearing.
  9. On December 9, 2009, the TCEQ Chief Clerk mailed notice to Respondent of the preliminary hearing scheduled for January 14, 2010.
  10. The notice of hearing:
    - Indicated the time, date, place, and nature of the hearing;
    - Stated the legal authority and jurisdiction for the hearing;
    - Indicated the statutes and rules the Executive Director alleged Respondent violated.

- Advised Respondent, in at least twelve-point bold-faced type, that failure to appear at the preliminary hearing or the evidentiary hearing in person or by legal representative would result in the factual allegations contained in the notice and EDPRP being deemed as true and the relief sought in the notice possibly being granted by default; and
  - Included a copy of the Executive Director's penalty calculation worksheet, which shows how the penalty was calculated for the alleged violations.
11. On January 14, 2010, the Executive Director and Respondent appeared at a preliminary hearing and agreed to a procedural schedule leading to an evidentiary hearing on May 6, 2010.
  12. The Executive Director's First Amended Report and Petition (EDFARP) was filed and sent to the Respondent on April 27, 2010. The allegations in the EDFARP are substantially similar to those found in the EDPRP.
  13. In the EDPRP and the EDFARP, the Executive Director recommended that the Commission enter an enforcement order assessing a total administrative penalty of \$7,875.00 against Respondent and that the Commission order Respondent to take certain corrective actions.
  14. On April 30, 2010, Respondent requested that the Executive Director perform an analysis of Respondent's ability to pay the administrative penalty.
  15. At the request of the Respondent, on May 5, 2010, the parties filed a Joint Motion for Continuance for the purpose of allowing the Executive Director sufficient time to perform an analysis of the Respondent's ability to pay the administrative penalty. The Motion for Continuance also stated that Respondent "has stipulated in writing to all matters in this case, including the calculation of the administrative penalty assessed."
  16. On May 6, 2010, a SOAH Administrative Law Judge granted the Motion for Continuance

and set a new date for the hearing on the merits of August 6, 2010.

17. On May 3, 2010, the Executive Director sent a facsimile to counsel for Respondent advising him of deficiencies in the financial documents submitted by Respondent that required correction before an analysis of Respondent's ability to pay the administrative penalty could be performed.
18. On June 16, 2010, the Executive Director sent a letter to counsel for Respondent requesting that he provide supplemental information to the Executive Director no later than June 25, 2010, to allow the Executive Director sufficient time to perform the requested analysis prior to the hearing on the merits. Respondent failed to respond to the Executive Director's requests for additional information. The Executive Director is unable to perform the requested analysis of Respondent's ability to pay the administrative penalty, which was the basis of the request for a continuance in this matter.
19. On July 16, 2010, the ED filed a Motion for Leave to File a Motion for Summary Disposition (Motion for Leave) and a Motion for Summary Disposition. Respondent did not respond to the Motion for Leave.
20. On July 26, 2010, the ALJ issued Order No. 6 granting the Motion for Leave and cancelled the hearing on the merits, stating that pursuant to 30 TEX. ADMIN. CODE § 80.137(b), that the Respondent would have until August 6, 2010, to file a response to the Motion for Summary Disposition.
21. Respondent did not file a response to the Motion for Summary Disposition.
22. The Respondent stipulated to the violation, penalty calculation, and corrective action recommended in the EDFARP.
23. The administrative penalty of \$7,875.00 is reasonable and necessary and was calculated

according to the TCEQ Penalty Policy.

24. The corrective action set forth in the EDFARP, to permanently remove the UST system from service, is necessary and appropriate given the violation and the requirements of 30 TEX. ADMIN. CODE § 334.47(a)(2).

## **II. CONCLUSIONS OF LAW**

1. Under TEX. WATER CODE ANN. § 7.051, the Commission may assess an administrative penalty against any person who violates a provision of the Texas Water Code or of the Texas Health and Safety Code within the Commission's jurisdiction or of any rule, order, or permit adopted or issued thereunder.
2. Under TEX. WATER CODE ANN. § 7.052, a penalty may not exceed \$10,000.00 per violation, per day for the violation alleged in this proceeding.
3. In addition to imposing an administrative penalty, the Commission may order the violator to take corrective action, as provided by TEX. WATER CODE ANN. § 7.073.
4. As required by TEX. WATER CODE ANN. § 7.055 and 30 TEX. ADMIN. CODE §§ 1.11 and 70.104, Respondent was notified of the EDPRP and of the opportunity to request a hearing on the alleged violations and the proposed penalty and corrective actions.
5. As required by TEX. GOV'T CODE ANN. §§ 2001.051(1) and 2001.052; TEX. WATER CODE ANN. § 7.058; 1 TEX. ADMIN. CODE § 155.27; and 30 TEX. ADMIN. CODE §§ 1.11, 1.12, 39.25, 70.104, and 80.6, Respondent was notified of the hearing on the alleged violations and the proposed penalty and corrective actions.
6. SOAH has jurisdiction over the hearing in this matter, including the authority to issue a Proposal for Decision with Findings of Fact and Conclusions of Law. TEX. GOV'T CODE ANN. ch. 2003.

7. Based on the Findings of Fact and Conclusions of Law, Respondent violated 30 TAC § 334.47(a)(2) by failing to permanently remove from service, no later than 60 days after the prescribed upgrade implementation date, a UST for which the applicable components of the system had not been brought into timely compliance with the upgrade requirements.
8. In determining the amount of an administrative penalty, TEX. WATER CODE ANN. § 7.053 requires the Commission to consider several factors including:
  - Its impact or potential impact on public health and safety, natural resources and their uses, and other persons;
  - The nature, circumstances, extent, duration, and gravity of the prohibited act;
  - The history and extent of previous violations by the violator;
  - The violator's degree of culpability, good faith, and economic benefit gained through the violation;
  - The amount necessary to deter future violations; and
  - Any other matters that justice may require.
9. The Commission has adopted a Penalty Policy setting forth its policy regarding the computation and assessment of administrative penalties, effective September 1, 2002.
10. Based on consideration of the above Findings of Fact, the factors set out in TEX. WATER CODE ANN. § 7.053, and the Commission's Penalty Policy, the Executive Director correctly calculated the penalties for the alleged violation and a total administrative penalty of \$7,875.00 is justified and should be assessed against Respondent.
11. Based on the above Findings of Fact, Respondent should be required to take the corrective action that the Executive Director recommends.

**NOW, THEREFORE, IT IS ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, IN ACCORDANCE WITH THESE FINDINGS OF FACT AND CONCLUSIONS OF LAW, THAT:**

1. Federico Villareal is assessed an administrative penalty in the amount of \$7,875.00 for violations of 30 TAC § 334.47(a)(2). The payment of this administrative penalty and Federico Villareal's compliance with all the terms and conditions set forth in this Order will completely resolve the matters set forth by this Order. The Commission shall not be constrained in any manner from requiring corrective actions or penalties for other violations that are not raised here. All checks submitted to pay the penalty assessed by this Order shall be made out to "Texas Commission on Environmental Quality." Administrative penalty payments shall be sent with the notation "Re: Federico Villareal; Docket No. 2009-0942-PST-E" to:

Financial Administration Division, Revenues Section  
Attention: Cashier's Office, MC 214  
Texas Commission on Environmental Quality  
P.O. Box 13088  
Austin, Texas 78711-3088

2. Within 30 days after the effective date of this Order, Federico Villareal shall permanently remove the UST system from service, in accordance with 30 TAC § 334.55.
3. Within 45 days after the effective date of this Order, Federico Villareal shall submit written certification and detailed supporting documentation, including photographs and a properly completed SUT registration form to the TCEQ indicating that the UST has been removed, in accordance with 30 TAC § 334.7, to:

Registration and Reporting Section  
Permitting & Remediation Support Division, MC 138  
Texas Commission on Environmental Quality

P.O. Box 13087  
Austin TX 78711-3087

4. Within 45 days after the effective date of this Order, Federico Villareal shall submit written certifications as described below, and include detailed supporting documentation including photographs, receipts, and/or other records to demonstrate compliance with Ordering Provisions Nos. 2. The certification shall be notarized by a State of Texas Notary Public and include the following certification language:

“I certify under penalty of law that I have personally examined and am familiar with the information submitted and all attached documents, and that based on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the submitted information is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fines and imprisonment for knowing violations.”

Federico Villareal shall submit the written certification and copies of documentation necessary to demonstrate compliance with these Ordering Provisions to:

Order Compliance Team  
Enforcement Division, MC 149A  
Texas Commission on Environmental Quality  
P.O. Box 13087  
Austin, TX 78711-3087

with a copy to:

Brad Gnezer, Waste Section Manager  
Texas Commission on Environmental Quality  
Corpus Christi Regional Office  
6300 Ocean Drive, Suite 1200  
Corpus Christi, Texas 78412-5503

5. The Executive Director may refer this matter to the Office of the Attorney General of the State of Texas (OAG) for further enforcement proceedings without notice to Respondent if

the Executive Director determines that Respondent has not complied with one or more of the terms or conditions in this Commission Order.

6. All other motions, requests for entry of specific Findings of Fact or Conclusions of Law, and any other requests for general or specific relief, if not expressly granted herein, are hereby denied.
7. The effective date of this Order is the date the Order is final, as provided by 30 TEX. ADMIN. CODE § 80.273 and TEX. GOV'T CODE ANN. § 2001.144.
8. The Commission's Chief Clerk shall forward a copy of this Order to Respondent.
9. If any provision, sentence, clause, or phrase of this Order is for any reason held to be invalid, the invalidity of any provision shall not affect the validity of the remaining portions of this Order.

ISSUED:

**TEXAS COMMISSION ON ENVIRONMENTAL QUALITY**

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**Bryan W. Shaw, Chairman**  
**For the Commission**